IN THE

Supreme Court of the United States.

October TERM, 1890

No. 15 *Original.*

EX-PARTE:—IN THE MATTER OF JOHN MAYFIELD, PETITIONER.

Petition for a Writ of Habeas Corpus.

Sam H Manning & Duane E. Fox.

THOS. MARCUM,
J. B. FORESTER,
WM. M. CRAVENS,
} Atty's for Petitioner.

LAW ASSOCIATION
—OF—
PHILADELPHIA.

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EX-PARTE:—IN THE MATTER OF JOHN MAYFIELD, PETITIONER.

Petition for a Writ of Habeas Corpus.

To the Hon. MELVILLE W. FULLER,

Chief Justice of the Supreme Court of the United States:

Your petitioner, John Mayfield, says that he was indicted on the 18th day of October, 1890, in the United States District Court for the Western District of Arkansas, for the crime of adultery, in the Indian country.

That afterwards to-wit: On the 16th day of December, 1890, your petitioner was tried and convicted for the crime aforesaid in said court. That afterwards to-wit: On the 9th day of January, 1891, your petitioner was sentenced to imprisonment in the House of Correction at Detroit, Michigan, for the crime aforesaid by the said District Court of the United States for the said District of Arkansas for the term and period of three years, that pursuant to the said indictment, verdict and sentence for the crime aforesaid, your petitioner was conveyed to the said House of Correction by the Marshal of said District and incarcerated therein where he now remains in pursuance of and by virtue of said sentence.

Your petitioner further states that he is a Cherokee Indian by blood and a recognized member of the Cherokee tribe of In-

dians and resided at the time of his arrest for the crime aforesaid in the said Cherokee Nation where the said crime is alleged to have been committed, that he has resided in said Cherokee Nation all of his life. Your petitioner further states that his imprisonment and restraint aforesaid is contrary to the law and the constitution of the United States. That he verily believes the said District Court had no jurisdiction of his person, he being a Cherokee Indian by blood and a resident of the Cherokee Nation and subject to the exclusive jurisdiction of the laws of said Nation for the crime aforesaid. Your petitioner attaches hereto true copies of said indictment with the endorsements thereon, and also a copy of said sentence, all of which are duly certified and asks that the same be made a part of this petition.

Wherefore your petitioner prays that your most gracious writ of *habeas corpus* be granted him, that he may be brought before your Honor to be dealt with according to law and that upon final hearing he be discharged from his said imprisonment and as in duty bound he will ever pray. JOHN MAYFIELD.

J. B. FORESTER,
WM. M. CRAVENS,
THOS. MARCUM,
Van Wagoner & Dwan E. Fox Attorneys for Petitioner

STATE OF MICHIGAN, } ss.
COUNTY OF WAYNE. }

The above named John Mayfield says the statements contained in the above and foregoing petition are true.

JOHN MAYFIELD.

Sworn to and subscribed before me this the 13th day of February, 1891.

JOSEPH NICHOLSON,
Notary Public, Wayne County, Michigan.

Endorsed on Petition.

We hereby state that the evidence offered to the jury in the case of John Mayfield, charged and tried for adultery, showed that he was a Cherokee Indian by blood, being one-fourth Indian blood, and that Mollie Phillips, with whom he lived in adultery is

ADMISSION.

I received this further admission from the Honorable Judge and District Attorney of the Court below since completing my argument.

UNITED STATES OF AMERICA,
WESTERN DISTRICT OF ARKANSAS.

We admit that at the trial of the case of the U. S. vs. John Mayfield, charged with adultery, the evidence showed defendant to be one-fourth Indian by blood, and a citizen of the Cherokee Tribe of Indians, and that he was lawfully married to a white woman by blood; and that Mollie Phillips, with whom the crime of adultery was charged to have been committed, was a white woman by blood; and that they both resided in Illinois District of the Cherokee Nation, Indian Territory, at the time of the commission of the adultery of which Mayfield was convicted.

Witness our hands and Seal of the Court at Ft. Smith in said District this 13th day of March, 1891.

I. C. PARKER,

[SEAL.] Judge U. S. Dist. Court, West. Dist. Ark.

WM. H. H. CLAYTON,

U. S. Atty. West. Dist. Ark.

a white woman by blood and a jurisdictional citizen of the United States, and that the wife of John Mayfield is a white woman and a jurisdictional citizen of the United States.

I. C. PARKER,
U. S. District Judge.
WM. H. H. CLAYTON,
U S. District Attorney.

UNITED STATES OF AMERICA—WESTERN DISTRICT OF ARKANSAS.
In the District Court, August Term, A. D. 1890.

UNITED STATES,
vs.
JOHN MAYFIELD. } Adultery.

The grand jurors of the United States of America, duly selected, impaneled, sworn and charged, to inquire in and for the body, of the Western District of Arkansas aforesaid, upon their oath present that John Mayfield on the first day of January A. D. 1890, at the Cherokee Nation, in the Indian country, within the Western District of Arkansas aforesaid did commit the crime of adultery with one Mollie Phillips, a white woman and not an Indian, and a single woman by him the said John Mayfield having then and there carnal knowledge of the body of the said Mollie Phillips, the said John Mayfield being then and there a married man, and then and there having a lawful wife alive other than the said Mollie Phillips, and the said John Mayfield and the said Mollie Phillips not being then and there lawfully married to each other.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

W. H H. CLAYTON.
United States Attorney, Western District of Arkansas.

[Endorsed:] No. 668. United States *versus* John Mayfield, Adultery. A true bill. Mark Jackson, foreman. Witnesses:

John E. McDaniel, Thos. Woodall, J. S. Downer, L. E. Whybark, John Sevier, Fred Scholt.

Filed October 18, 1890. STEPHEN WHEELER, Clerk.

We the jury find the defendant guilty as charged in the within indictment. I. A. CAMPBELL, Foreman.

December 16, 1890.

In the District Court of the United States for the Western District of Arkansas, November Term, 1890

FRIDAY MORNING, 8 1-2 O'CLOCK,
January 9, 1891.

Court met pursuant to adjournment.

Present: The Honorable Isaac C. Parker, Judge of the District Court of the United States for the Western District of Arkansas.

UNITED STATES, *versus.* JOHN MAYFIELD.	No. 668.	Indictment for Adultery in the Indian Country.

On motion of Wm. H. H. Clayton, Esq., Attorney for the Western District of Arkansas, the said defendant, John Mayfield, was brought to the bar of the court, in custody of the Marshal of said District, and it being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty heretofore returned against him by the jury in this cause on the 16th day of December A. D. 1890 shall not now be pronounced against him, he says he has nothing farther or other to say than he has heretofore said; whereupon there being no penitentiary in the State of Arkansas suitable for the confinement of convicts, and the House of Correction at Detroit, Michigan, having been designated by the Attorney-General of the United States as a place of imprisonment for persons sentenced by this court, and the premises being seen, and by the court well and sufficiently understood it is considered by the court here: that the said John Mayfield for his felony aforesaid, be imprisoned in the House of Correction situated at Detroit in the Eastern District of Michigan for the term and period of three (3) years, and that he pay to the United States

of America a fine of ——— dollars, together with all their costs in and above this prosecution laid out and expended, and that they have execution therefor.

It is further considered that the Marshal of the Western District of Arkansas, to whose custody the said John Mayfield is now here committed, receive and safely keep and convey the body of the said John Mayfield hence to said House of Correction in the State of Michigan, without delay, and deliver him to the keeper of said House of Correction, who will receive and safely keep the said John Mayfield in jail in execution of the sentence aforesaid, and in conformity with the same for the full period aforesaid, and it is further ordered that the clerk of this court furnish the Marshal of this district with two duly certified copies of this judgment, sentence and order, one of which shall be delivered to the keeper of said House of Correction, and the other returned by the Marshal to this court, with a full and true account of the execution of the same.

I, Stephen Wheeler, Clerk of the District Court of the United States, in and for the Western District of Arkansas, hereby certify that the foregoing is a true and correct copy of the indictment with endorsements thereon and judgment, sentence and order in the above entitled cause as the same appears of record.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Fort Smith, in said District, this 17th day of January A. D. 1891. STEPHEN WHEELER,

By J. M. DODGE, D. C. Clerk.

ARGUMENT BY THOS. MARCUM IN BEHALF OF THE PRISONER.

May it Please the Court:

It will be observed that the records in this case show that the petitioner is a Cherokee Indian by blood, that the crime for which he was sentenced was committed by him, if at all, in the

Cherokee Nation, that his wife is a white woman and Mollie Phillips, the alleged adulteress, is a white unmarried woman. He has all his life lived in the Cherokee Nation.

The main question involved therefore, is as to the jurisdiction of the court below, of the preson of the prisoner and of the crime mentioned in the indictment.

The act of congress of March the 3, 1887, under which the prisoner was tried and sentenced contains twenty-seven sections, seventeen of which relate, I believe, exclusively, to the Territory of Utah, to-wit: 6, 7, 8, 11, 12, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26 and 27. Indeed it seems that the description of the evils and the conditions and circumstances surrounding them, as set forth in this act which was intended to be remedied by congress, that the entire law was designed alone for the Territory of Utah where mormonism exists to such a large extent.

But, be this as it may, there can be but little doubt, that this act does not apply to the five civilized Indian Nations.

Section 2144 says: "The general laws of the United States defining and prescribing punishments for forgery and for depredations upon the mails shall extend to the Indian country."

Section 2145 says: "Except as to crimes the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."

Section 2146 provides that "The preceding section shall not be *construed* to extend to any *Indian* committing any offense *in* the *Indian Country* who has been punished by the local laws of the tribe, or to any *case* where, by treaty stipulations, the exclusive jurisdiction over such offenses is or *may be* secured to the Indian tribes respectively."

The words "is or may be secured to the Indian tribes" are very significant in the solution of this question of jurisdiction.

But I shall show further on that jurisdiction in this kind of a case has already been secured to the Cherokee Nation.

The 13th Article of the treaty between the United States

and the Cherokee Nation says: that "The Cherokees also agree that a court or courts may be established by the United States in said Territory, with such jurisdiction and organized in such manner as may be prescribed by law: Provided, that the judicial tribunals of the Nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the Nation, by nativity or adoption, shall be the only parties, or where the cause of action shall *arise* in the *Cherokee Nation*, except as otherwise provided in this treaty."

This is conclusive upon the question of jurisdiction, unless it is " therwise" provided in the treaty, or unless this treaty has been repealed by some law of congress or is inconsistent therewith.

The 7th Article of the Treaty referred to, among other things, says:

"The United States Court to be created in the Indian Territory, and until such court is created therein the United States District Court, the nearest to the Cherokee Nation, shall have exclusive original jurisdiction of all causes, civil and criminal, wherein an inhabitant of the district hereinbefore described shall be a party, and where an inhabitant outside of said district, in the Cherokee Nation, shall be the other party, as plaintiff or defendant in a civil cause, or shall be defendant or prosecutor in a criminal case, * * *." This is the only part of this treaty that changes or affects the jurisdiction of the Cherokee Nation, as conferred by the 13th Article above referred to.

The District of the Cherokee Nation referred to in the 7th Article of this Treaty is described in the 4th Article of the Treaty and is known as the Canadian District. The nearest United States Court to the Cherokee Nation at the time this Treaty was made is the District Court at Fort Smith and it has often exercised jurisdiction as provided by the 7th Article as the records will show.

The language used in the 13th Article in conferring jurisdiction upon the Cherokee Nation is no less positive and conclusive than that used in the 7th Article which conferred jurisdiction upon the court below. Under the 7th Article of the Treaty mentioned the jurisdiction of the court below as between Indians, ab-

solutely, ceased upon the establishment of a United States Court in the Indian Territory, which was done by the Act of March the 1st, 1889.

The crime is alleged to have been committed January 1, 1890.

U. S. Courts are of limited jurisdiction and every fact necessary to establish jurisdiction should appear upon the face of the indictment. In this case nothing of the kind appears except that Mollie Phillips, the alleged adulteress, is a white woman. She is neither a prosecutor nor defendant in the case, and the law does not punish her for what she did. Hence the prisoner stands alone as the criminal and he is an Indian by blood and the crime was committed in the Cherokee Nation and the indictment is silent as to his citizenship.

"While a writ of *habeas corpus* cannot generally be made to subserve the purposes of a writ of error, yet when a prisoner is held without any lawful authority, and by an order beyond the jurisdiction of an inferior Federal Court, this court will, in favor of liberty, grant the writ, not to review the whole case, but to examine the authority of the court below to act at all."

Ex parte Virginia, 100 U S. 339.
Ex parte Yerger, 8 Wall, 85
Ex parte Lang, 18 Wall. 163.

See also

Ex parte Bidgelow, 113 U. S. 328.
Ex parte Wilson, 114 U. S. 417.
Ex parte Yarbrough, 110 U. S. 651.
Ex parte Curtis, 106 U. S. 371.
Ex parte Read, 100 U. S. 13.
Ex parte Carll, 106 U. S. 521.

The Judge of the court below and the District Attorney are free to admit that the prisoner's wife and Mollie Phillips are white women and jurisdictional citizens of the United States and I am quite sure there are numbers of other jurisdictional citizens of the United States, who like the prisoner's wife and Mollie Phillips' have nothing to do with this case, but the point here is, Who is the prisoner? Is he a "jurisdictional" citizen? If so, where do we find the fact? It is not shown in the indictment. It does

not appear in the records anywhere, nor in the admissions of the Honorable Judge and District Attorney?

Undoubtedly the burden is upon the prosecution to show affirmatively a case within the jurisdiction of the court before the prosecution can proceed. It cannot be determined from the indictment whether the prisoner is a white man, an Indian, a Chinaman, a negro, a Mexican or an Egyptian. But the prosecution was conducted to a final determination, and the poor being, whatever he may be, is in the Detroit House of Correction and the overriden law remains as before.

Section 30 of the Act of Congress of May 2, 1890, says among other things: "provided, however, that the judicial tribunals of the Indian Nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the Nation by nativity or adoption shall be the only parties; and as to all such cases the laws of the State of Arkansas extended over and put in force in said Indian Territory by this Act shall not apply."

By this Act Congress has positively conferred jurisdiction upon the Indian Courts as well as upon the United States Court in the Indian Territory.

This is a fulfillment of the Treaty of 1866 with the Cherokees, which says they shall have and retain, exclusive, jurisdiction in all cases between adopted citizens, etc.

Section 31 of the last mentioned Act provides that "The Constitution of the United States and all General Laws of the United States which prohibit crimes and misdemeanors in any place within the sole and exclusive jurisdiction of the United States, except in the District of Columbia, and all laws relating to National Banking Associations shall have the same force and effect in the Indian Territory as elsewhere in the United States; but nothing in this Act shall be construed as to deprive any of the courts of the civilized Nations of *exclusive* jurisdiction over all cases arising wherein *members* of said Nations, whether by treaty, blood, or adoption, are the sole parties, nor so as to interfere with the *right* and *power* of said civilized Nations to punish said members for violation of the statutes and laws enacted by their National Councils where such laws

are not contrary to the treaties and laws of the United States."

For the Cherokees to enact a law punishing the offense mentioned in the indictment would not only not be contrary to the Treaties and Laws of the United States, but would be in strict harmony with the last two sections of the Act of Congress as well as with the Treaty of 1866, if it is true that the prisoner is an Indian as admitted by the Honorable Judge and District Attorney, and that such is true there is no doubt as a matter of fact.

The District Court at Fort Smith has always held jurisdiction in cases where one adopted citizen of the Cherokee Nation committed a crime against another adopte citizen, but why since the Treaty with the Cherokees, July 19, 1866, I do not know. I am aware of the fact that this court held the same way in the case of the United States vs. Rogers, 4 How. 567. But this ruling was made in 1845, and long prior to the Treaty of 1866. In this case the Treaty of New Echota is referred to in these words:

"It may have been supposed that the Treaty of New Echota, made with the Cherokees in 1835 (17 Stats. at large, 478) ought to have some influence upon the construction of this Act of Congress, and extend the exception to all the adopted members of the tribe. But there is nothing in the Treaty in conflict with the construction we have given to the law.

The 5th Article of the Treaty stipulates, it is true, that the United States will secure to the Cherokee Nation the right by their National Councils, to make and carry into effect such laws as they may deem necessary for the government and protection of the persons and property within their own country, belonging to their people, or such persons as have connected themselves with them. But a proviso immediately follows, that such laws shall not be inconsistent with the Constitution of the United States, and such Acts of Congress as *had* been *or* might be passed, regulating trade and intercourse with the Indians. Now the Act of Congress, under which the prisoner is indicted, had been passed but a few months before, and this proviso in the treaty shows that the stipulation above mentioned was not intended or understood to alter in any manner its provisions or affect its construction. Whatever obligations the prisoner may have taken upon himself

by becoming a Cherokee by adoption, his responsibility to the Laws of the United States remained unchanged and undiminished. He was still a white man, of the white race, and therefore not within the exception in the Act of Congress."

The Act of June 30, 1834, is the one referred to in the above case and reads thus:

"So much of the Laws of the United States as provided for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States shall be in force in the Indian Country: provided, that the same shall not extend to crimes committed by one *Indian* against another *Indian*."

There is a wide difference between this Law of 1834 and the Treaty of 1835. The right given to the Cherokees to make Laws for the *protection*, etc., of their people and property required that such Laws as they might make should not be inconsistent with the Constitution of the United States or the Laws of Congress. The Act of 1834 only excepted out of the operation of the United States Laws crimes committed by one *Indian* against another *Indian*.

No one will contend that an adopted white man is an Indian, and hence the correctness of the ruling of this Court in the case of Rogers.

If the Cherokee Nation had assumed jurisdiction over crimes of adopted white citizens, it would have been contrary to the Act of 1834 and the Treaty of 1835.

The Cherokee Nation under the Treaty of 1835, had the right to make all such Laws as they might have deemed proper for the protection and government of white adopted citizens, but it could not have made laws punishing such offenses by persons over whom Congress had conferred jurisdiction upon the Federal Courts by the Act of 1834.

In other words Congress, by the Act of 1834, limited the jurisdiction of the Cherokee Nation to controversies strictly between Indians, and especially was that Nation prohibited from punishing adopted white citizens for crimes made punishable by Congress in any place within the sole and exclusive jurisdiction of the United States.

The court below has always held, as the records will show, that it had no jurisdiction of crimes committed by a white man married to a Choctaw upon the person or property of another white man married to a Choctaw Indian.

See Ex parte Reynolds 5, Dillion 394, and these rulings are based upon the 38th Article of the Treaty with the Choctaws in 1866, which says: "Every white person who having married a Choctaw or Chickasaw and resides in the said Choctaw or Chickasaw Nation, or who has been adopted by the legislative authorities, is to be deemed a member of said Nation, and shall be subject to the Choctaw and Chickasaw Nations according to his domicile, and to prosecution and trial before their tribunals, and to punishment according to their laws, in all respects as though he was a native Choctaw or Chickasaw."

Is there one particle of difference between this Treaty and the 13th Article of the Treaty of 1866 with the Cherokees so far as conferring jurisdiction upon those Nations, as between adopted white citizens, is concerned? If so, where is the distinction?

The Cherokee Treaty is as binding upon the United States as that of the Choctaw Treaty. But while there is a difference in the phraseology of the two treaties upon this subject they are substantially and legally the same, and the contracting parties meant one and the same thing, namely, to confer jurisdiction upon these Nations in such cases. If it is possible to confer jurisdiction upon the Choctaw Nation then it has been conferred upon the Cherokee Nation.

The Choctaw Treaty says the white adopted citizen shall be subject to trial, etc., the same as if he was a native Choctaw. Does this make him a Choctaw any more than he was before? He is a white man just as before he was married.

I had the pleasure once of representing one side of a law suit in one of the Arkansas courts and a point arose which illustrates this proposition:

Some minor children of deceased parents wanted a division of their lands and one of them not being of age the Probate Judge made an order removing the minor's disability and pronounced the boy, then about thirteen, to be of full age. So the division was effected.

The Cherokee Treaty and the statutes of the Cherokee Nation and the laws of Congress in conferring jurisdiction upon the Courts of the Cherokee Nation as between white adopted citizens is as strong as language could have made it.

A white man is a white man, a Choctaw a Choctaw, a Cherokee a Cherokee, because God made them such, and it is beyond the power of human legislation to change it.

As the immortal Henry Clay once said before the American Senate upon the Expunging Resolution: "You cannot make that not to be which has been."

What more is necessary to give jurisdiction to the Cherokee Nation over white adopted citizens?

"The Acts of our Government recognize the Cherokee Nation as a State and the Courts are bound by those Acts."

Eastern Band of Cherokee Indians
versus
United States,
117, U. S 288.

In the same case it was held that the Cherokee Nation was the exclusive judge of who her citizens shall be.

"The word State is used in various senses. "In its most enlarged sense it signifies a self-sufficient body of persons, united together in one community for the defense of their rights and to do right and justice to foreigners. In this sense the word State means the whole people united into one body politic."

Says Vattel, page 9: "The perfection of a State, and its aptitude to attain the ends of society, must then depend on its constitution; consequently the most important concern of a Nation that forms a political society, and its first and most essential duty towards itself is to chose the best constitution possible, and that most suitable to its circumstances. When it makes this choice, it lays the foundation of its own preservation, safety, perfection and happiness; it cannot take too much care in placing these on a solid basis."

The Cherokee Constitution, as will be seen hereafter, shows

that white adopted citizens are eligible to a seat in their legislative councils. No civilized people on earth has ever allowed foreigners and non-citizens to become representatives in their legislative bodies. The United States has ever allowed white citizens to intermarry with Cherokees and the highest court in the land has proclaimed that the Cherokees are the judges of who her citizens shall be and that Nation, having recognized by her constitution the intermarried white man as one of her citizens, made him her representative and her law maker, and having obtained this privilege from the United States through the highest order of contract and then for the United States to hold him responsible for a crime against one of his own fellow-citizens of the Cherokee Nation, as well as his fellow councilman, would result in chaos and ruin to the government of the Nation and to the wards of the general government which latter is bound by the most sacred obligations to protect, encourage and defend.

"Indian tribes are States in a certain sense, although not foreign States or States of the United States within the meaning of the Constitution."

Holden *vs.* Joy, 17 Wall. 211.

Warner *vs.* Joy id, 253.

"A treaty with an Indian tribe is the supreme law of the land. Courts cannot annul its effect or operation."

Fellows *vs.* Blacksmith, 19 How. 366.

Turner *vs.* The American Baptist Missionary Union, 5 McL. 344.

"Congress has the right to control the Indians by law instead of by Treaty."

118 U. S. 375.

But the last law of Congress, May 3, 1890, upon the subject of Cherokee Jurisdiction, gives the Courts of that Nation jurisdiction in this case. Section 31 of that Act substantially repeats the Act of 1834 and Section 2145 of the Revised Statutes of the United States and adds that the Constitution shall apply, and in the same Section says: "But nothing in this Act shall be so *construed* as to *deprive* any of the courts of the civilized nations of *exclusive* jurisdiction over *all* cases arising wherein members of

said nations, whether by treaty, blood, or adoption, are the sole parties, nor so as to interfere with the right and power of said civilized nations to punish said members for violation of the Statutes and Laws enacted by their National Councils where such laws are not contrary to the Treaties and Laws of the United States."

Is it against the laws of the United States for an Indian Court to punish an Indian for an act not against a citizen of the United States, nor against the United States itself? The treaty of 1866 with the Cherokees is in conflict with Section 2146 of the Rev. Stat. in so far that under that Section the United States still retained jurisdiction over white adopted citizens, but the Treaty of 1866 says the Cherokees shall have and retain jurisdiction over this class of citizens, while Section 31 of the Act of 1866 above quoted without any limitation whatever says the Cherokee Courts shall have exclusive jurisdiction over all cases, civil and criminal, wherein members by treaty, blood or adoption shall be the sole parties. It gives the Cherokee Nation the right also to punish such members for violations of Cherokee Statutes which are not in violation of the Laws of Congress. How could it be contrary to the Laws of Congress to punish members of the Nation for crimes committed against another member when the section last mentioned gives the Nation the exclusive jurisdiction over them?

Where is the equity and the humanity of a law that takes a civilized man out of his own native country to be tried among strangers? If he be married to a white woman the additional punishment is laid upon her and her children of having the husband and father imprisoned in a distant land and a different clime.

The Cherokees have never been, by conquest, reduced to the situation of subjects to any conqueror, and thereby lost their separate national existence and the rights of self government and become subject to the laws of the conquerors. Whenever wars have taken place, they have been followed by regular treaties of peace, containing stipulations on each side according to existing circumstances, the Cherokee Nation always preserving its distinct and separate national character. And after a long experience in the af-

fairs of local self government to say they are not capable of and have not the right under the Treaties and Laws quoted above to punish their own citizens by blood for crimes committed in their own country and against their own society is to them a sad commentary upon their acknowledged independence of whatever character it may be, and will tend to destroy their confidence in their future struggles for a still higher position in the sisterhood of Nations and civilized communities.

It is admitted, on the application of the prisoner, that he is an Indian, by his Honor Judge Parker, and the Honorable District Attorney W. H. H. Clayton. They also state that they admit that the wife of the prisoner is a white woman and a jurisdictional citizen of the United States and that Mollie Phillips, the alleged adulteress, is a white woman and a jurisdictional citizen of the United States.

These admissions are more of an expression of an opinion than the mere admissions of the facts proven so far as the jurisdictional citizenship of these women are concerned. I deny that the prisoner's wife is a jurisdictional citizen of the United States.

The Treaty of 1866, the Act of May 2, 1890, shows that she is not any longer subject to the jurisdiction of the United States. These admissions may be correct opinions as to the law, but that is one of the questions to be settled by this Honorable Court.

Article 5 of the Amendments to the Constitution of the Cherokee Nation of 1866, in speaking of the eligibility of persons to a seat in the Council says:

"No person shall be eligible to a seat in the National Council but a male citizen of the Cherokee Nation, who shall have attained to the age of twenty-five years, who shall have been a *bonafide* resident of the district in which he may be elected, at least six months immediately preceding such election.

All native born Cherokees, all Indians, and whites legally members of the Nation by adoption, and all freedmen who have been liberated by voluntary act of their former owners or by law, as well as free colored persons who were in the country at the commencement of the Rebellion, and are now residents therein, or who may return within six months from the 19th day of

July, 1866, and their descendants, who reside within the limits of the Cherokee Nation shall be taken, and deemed to be, citizens of the Cherokee Nation."

Article 15, Section 67 of the Statutes of the Cherokee Nation of November 19th, 1873, provides that "Whereas the peace and prosperity of the Cherokee people require that in the enforcement of the laws, jurisdiction should be exercised over all persons whatever who may from time to time be priviliged to reside within the Territorial limits of this Nation, therefore, every white man, or citizen of the United States, or of any foreign State or government, desiring to marry a Cherokee woman, citizen of the Nation, shall be and is hereby required to obtain a license for the same from any of the District Clerks of the several Districts and make oath or satisfactory showing to such Clerk, that he has not a surviving wife from whom he has not been lawfully divorced. And, unless such information be freely furnished to the satisfaction of the Clerk, no license shall issue."

Section 73 of the same Article says: "Every adopted citizen of the Cherokee Nation, by marriage or otherwise, who shall use the intercourse law or laws (as they are termed) in the prosecution of a Cherokee Indian, for any criminal offense committed within the limits of the Cherokee Nation shall forfeit his rights of *citizenship* to the same and be subject to be dealt with as other intruders in the country, and shall be removed out of this Nation."

Section 74 of the same Article says: "Should any man or woman, a citizen of the United States or of any other foreign country, become a citizen of the Cherokee Nation by intermarriage, and be left a *widow* or *widower* by the decease of the Cherokee *wife* or *husband*, such surviving widow or widower shall continue to enjoy the rights of citizenship, unless he or she shall marry a white man or woman, or person (as the case may be) having no right of Cherokee citizenship by blood; in that case, all of his or her rights acquired under the provisions of this Act shall cease."

These provisions of the Cherokee Constitution and of the Laws made under it together with the 12th Article of the Treaty referred to conclusively show that a white person, man or woman, who intermarries with a Cherokee Indian becomes an adopted citizen

of the Cherokee Nation and possesses all the rights, privileges and immunities of native born Cherokees. Then are they members of the body politic of the Cherokee Nation. If so, then they are members of the tribe of Cherokees. If they are members of that tribe then, as between them and an Indian by blood, the United States District Court at Fort Smith, nor that of any other place, has any jurisdiction as to any controversy that may arise between them because the Act of Congress of May 2, 1890, confers jurisdiction in such cases upon the Cherokee Nation.

Then if the unmistakable declaration of Congress is valuable in the interpretation of its meaning, the question of the citizenship, so far as the jurisdiction of the Federal Courts in the Indian country is concerned, no longer applies to members of the civilized nations, because it is membership that confers exclusive jurisdiction upon the one and deprives the other of it.

I refer to Cherokee jurisdiction on the ground of membership because of the so called admissions of the Honorable Judge and District Attorney at Fort Smith, that the prisoner's wife was "a white woman and therefore a jurisdictional citizen of the United States."

This is for the evident purpose of presenting a suggestion that on account of it the crime of which the prisoner was convicted was a crime against a citizen of the United States and thus sustain Federal jurisdiction.

Upon this point I contend that the crime of adultery is not a crime against any person. It is not a crime against Mollie Phillips because her consent and participation is implied in the charge. She is *particeps criminis* in the immoral act. But the 3rd Section of the Act under which the prisoner was sentenced fails to render her culpable because she was an unmarried person.

Murder is a crime against life in one sense. Rape is a crime against the person, so is an assault, mayhem, etc. Larceny is a crime against property, so is robbery, forgery and the like.

Adultery, I contend, is a crime against society, and if so, in this case against what society? Cherokee society, or white man's society? It is certain the crime was committed, if at all, in the midst of the society of Cherokee Indians who have their marriage

laws and various other wholesome laws against immorality, among others against the prostitution of the sexes.

But the records in this case, nor the admissions of the Honorable Judge and District Attorney, neither show that a single white or colored citizen of the United States lived in the vicinity where the crime was committed except Miss Phillips. The treaties of the United States with the Cherokees as well as the Laws of Congress forbids that United States citizens shall reside in the Cherokee Nation except on certain conditions. I imagine that it will not be presumed that there was white society unless the indictment in this case alleged it and it does not, and if it was important the law would require it, and hence no crime against the United States is charged if, indeed, the court in any view of the case had jurisdiction. I am fully persuaded that Miss Phillips is not society, nor the representative thereof in the Cherokee Nation. But the law has excused her, the Mormon law puts a quietus on any punishment that she might morally merit.

If there were United States citizens in the Cherokee Nation all will agree that that country was given to the Cherokees for a valuable consideration and that they inhabit it.

The country is theirs. They have their Constitution and their Laws, the have their legislatures to enact more laws, they have their executive, judicial and ministerial officers and a government, Republican in form and patterned very much after that of the United States. They have their churches, their schools.

The right of local self government has long since been conceded to them by the United States, and it is their constitutional right and their treaty right to legislate just as they please within the scope and limits of the Federal Constitution.

The right given unto the Cherokees to make and enforce laws to carry on local self government was and is one of the most encouraging features of their National life.

Could Congress punish crimes in the States simply because the State had failed to do so?

Then if the Cherokee Nation has not the exclusive right to punish her own citizens by blood in all cases where the crime is not against a citizen of the United States, why has Congress not

the right to punish adultery in Arkansas where no law exists against it?

If adultery in the Indian Country by an Indian is a crime against the United States, then why is not murder of one Indian by another, and larceny of one Indian against another, in a word, every crime committed by one Indian against another, likewise a crime against the United States? Are not all crimes against society? Is not the whole system of our criminal laws inaugurated for the protection of society?

If then the Federal Court at Fort Smith has jurisdiction of this case on the ground that it is against society, though the prisoner being an Indian and though all crimes are against society, then where are the cases that are cognizable before the Cherokee Courts? Where is the right of local self government in the Cherokee Nation? What then is the difference between an Indian and a white man so far as Federal jurisdiction is concerned? Where is the line that marks the distinction between the Cherokee and the Federal jurisdiction? What becomes of the Cherokee government with no right to punish crimes against its own society?

Every citizen of the United States is or has the right, *ipso facto*, to become a citizen of some State without any appeal to the naturalization laws of Congress. The Indian is not a citizen of the United States and cannot become such without appealing to the naturalization laws the same as an alien. See Elk *vs.* Wilkins 112, U. S. 93.

It is true that the Federal Courts have jurisdiction over all persons who commit crimes directly against the United States, crimes such as counterfeiting the currency or coins of the United States, or stealing the property of the United States or against the revenues of the United States, against the United States mails and the like.

If the prisoner had been arrested by the Cherokee Nation for the crime alleged in the indictment, who would have been the parties? The Cherokee Nation as prosecutor and the prisoner, an Indian by blood, the defendant, and the question again recurs who is the injured party? Not the United States nor any of her citizens? Suppose that one Indian commits the crime mentioned in the in-

dictment with another Indian. Would it not be just as offensive to white society, if any existed there, as if one of the participants in the crime had been a United States citizen? All crimes by one Indian against another, murder, rape, etc., are just as offensive to white society as against that of an Indian?

Then if the jurisdiction of the Federal Courts are to be extended to all crimes committed in the Indian Country because they are offensive to white society, I am sure the Indian courts are without any jurisdiction in all cases where white people have any society.

If this crime of adultery is to be considered a crime against the prisoner's wife, and though she may be considered a citizen of the United States, yet she is a member by adoption of the Cherokee Tribe of Indians and subject to trial and punishment by the Cherokee Laws by virtue of which she became a member of that Nation and by which she is permitted to live in that Nation. She connected herself with this tribe with this understanding—the United States did not object, but on the contrary agreed by treaty and through the Laws of Congress that she should be a member of the tribe and that it should have exclusive jurisdiction of her person.

If then the Cherokee Nation should punish her for a crime against another adopted citizen, as Congress has said it could, and then the United States should punish her also and in that way drag her from her own country and home for the purpose of protecting white society where it some times does not exist, and inflict a double punishment upon a helpless woman. Is this in accord with a great government like ours?

The guardian of the Indian and the inflictor of double punishments upon its wards, and yet having said by treaty and laws, it should not be done, would be a frightful commentary upon the American government.

If it is to be determined that the United States can take people out of their own country and administer justice better to the Indian than his own Nation can, and that the Indian is incapable of it, it seems to me that the unsurpassed wisdom of an American Congress would have long since, in unmistakable language, taken away every vestige of Cherokee jurisdiction and saved thereby the millions of money expended by the Nation's wards in the experiment of self-government.

Respectfully
Duane E. Fox.

141-19

FILED
MAY 1 1891
JAMES. H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 15, ORIGINAL. EX PARTE: JOHN MAYFIELD.

BRIEF FOR THE UNITED STATES.

WM. A. MAURY,
Assistant Attorney-General.

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 15, ORIGINAL. EX PARTE: JOHN MAYFIELD.

BRIEF FOR THE UNITED STATES.

The petitioner, John Mayfield, was indicted and convicted in the United States district court for the western district of Arkansas of the crime of adultery, at the Cherokee Nation, in the Indian Territory, and on January 17, 1891, he was sentenced by said court to imprisonment for three years in the Detroit house of correction and to the payment of all the costs of the prosecution.

He asks to be released from imprisonment, on the ground that he is a Cherokee Indian by blood, and a recognized member of the Cherokee tribe of Indians, and resided in the Cherokee Nation at the time of his arrest for the said crime, and has resided in the Cherokee Nation all of his life.

The following statement was indorsed on the petition for the writ of habeas corpus by the judge before whom

the petitioner was tried and the district attorney who conducted the prosecution, to wit:

> We hereby state that the evidence offered to the jury in the case of John Mayfield, charged and tried for adultery, showed that he was a Cherokee Indian by blood, being one-fourth Indian blood, and that Mollie Phillips, with whom he lived in adultery, is a white woman by blood and a jurisdictional citizen of the United States, and that the wife of John Mayfield is a white woman and a jurisdictional citizen of the United States.
>
> I. C. PARKER,
> *U. S. District Judge.*
> WM. H. H. CLAYTON,
> *U. S. District Attorney.*

(pp 2, 3.)

Subsequently the judge and district attorney delivered to the petitioner's counsel the following paper:

> UNITED STATES OF AMERICA,
> *Western District of Arkansas:*
>
> We admit that at the trial of the case of the U. S. *vs.* John Mayfield, charged with adultery, the evidence showed defendant to be one-fourth Indian by blood, and a citizen of the Cherokee Tribe of Indians, and that he was lawfully married to a white woman by blood; and that Mollie Phillips, with whom the crime of adultery was charged to have been committed, was a white woman by blood; and that they both resided in Illinois district of the Cherokee Nation, Indian Territory, at the time of commission of the adultery of which Mayfield was convicted.
>
> Witness our hands and seal of the court at Ft. Smith, in said district, this 13th day of March, 1891.
>
> [SEAL.]
> I. C. PARKER,
> *Judge U. S. Dist. Court, West. Dist. Ark.*
> WM. H. H. CLAYTON,
> *U. S. Atty. West. Dist. Ark.*

The paper is inserted between pages 2 and 3 of the record.

Upon the record and this statement of facts, thus irregularly introduced, it is contended that the court that tried and convicted the petitioner had no jurisdiction over him, and, consequently, that the conviction was null and void.

The prosecution of the petitioner was founded on section 3 of the act of March 3, 1887, entitled "An act to amend

'An act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States in reference to bigamy, and for other purposes,' approved March twenty-second, eighteen hundred and eighty-two" (24 Stat., 635). Section 3 is as follows:

> That whoever commits adultery shall be punished by imprisonment in the penitentiary not exceeding three years; and when the act is committed between a married woman and a man who is unmarried, both parties to such act shall be deemed guilty of adultery, and when such act is committed between a married man and a woman who is unmarried, the man shall be deemed guilty of adultery.

This section is made applicable to the Indian Territory by section 2145 of the Revised Statutes, which is as follows:

> Except as to crimes the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

The indictment is as follows:

UNITED STATES OF AMERICA—WESTERN DISTRICT OF ARKANSAS.

In the District Court, August Term, A. D. 1890.

UNITED STATES vs. JOHN MAYFIELD. } Adultery.'

The grand jurors of the United States of America, duly selected, impaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present that John Mayfield on the first day of January, A. D. 1890, at the Cherokee Nation in the Indian country, within the western district of Arkansas aforesaid, did commit the crime of adultery with one Mollie Phillips, a white woman and not an Indian, and a single woman, by him the said John Mayfield having then and there carnal knowledge of the body of the said Mollie Phillips, the said John Mayfield being then and there a married man, and then and there having a lawful wife alive other than the said Mollie Phillips, and the said John Mayfield and the said Mollie Phillips not being then and there lawfully married to each other.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

W. H. H. CLAYTON,
United States Attorney, Western District of Arkansas.

ARGUMENT.

The answer to the allegation of the want of sufficient cause for the petitioner's detention, is that he is held by virtue of a judgment of the district court of the United States for the western district of Arkansas.

If that court had jurisdiction of the crime of adultery of which the petitioner was convicted, it would seem that the return to the rule shows a complete justification for his detention.

By section 533, Revised Statutes, the jurisdiction of the district court of the United States for the western district of Arkansas was extended to "the country lying west of Missouri and Arkansas, known as the Indian Territory."

But the jurisdiction of this court over the Indian Territory was considerably abridged by the act of Congress of March 1, 1889 (25 Stat., 786), annexing a part of that Territory to the eastern district of Texas, and the act of January 6, 1883 (22 Stat., 400), annexing another part to the district of Kansas.

It suffices to say that the residue of the Territory left to the jurisdiction of the district court for the western district of Arkansas embraces the venue of the crime as laid in the indictment.

The jurisdiction of the court established for the Indian Territory by the act of March 1, 1889 (25 Stat., 783), does not interfere with the jurisdiction of the district court, because the jurisdiction of the former is limited to offenses "not punishable by death or by imprisonment at

hard labor." (See also section 33 of the act of May 2, 1890, Pamphlet Laws 1889–'90, pp. 96, 97.)

It is true the offense of adultery is punishable "by imprisonment in the penitentiary not exceeding three years," but, inasmuch as a prisoner convicted of this offense may, under the provisions of chapter 9, title 70, of the Revised Statutes, be imprisoned in a penitentiary where hard labor is exacted of all prisoners, it may be said with entire propriety that hard labor is a possible punishment for the crime of adultery. In *Ex parte* Karstendick (93, U. S. R, 399), the court used the following language on this subject:

> Where the statute requires imprisonment alone, the several provisions which have just been referred to place it within the power of the court, at its discretion, to order execution of its sentence at a place *where labor is exacted as part of the discipline and treatment of the institution or not, as it pleases. Thus, a wider range of punishment is given, and the courts are left at liberty to graduate their sentences so as to meet the everrarying circumstances of the cases which come before them.*

To the same effect is the case of *In re Mills* (135 U. S. 263).

It can not be doubted that the Cherokee Nation is within the western district of Arkansas.

It can not be doubted that the offense of adultery was cognizable by the district court of the said district.

The court having jurisdiction of the offense, it can not be doubted that it must be conclusively taken to have had jurisdiction of the prisoner in the absence of any plea filed by him showing that the court had not, for some reason, jurisdiction over him, in accordance with the long established principle laid down in Peacock *v.* Bell (1 Saund., 74), that "nothing shall be intended to be out of the

jurisdiction of a superior court *but that which specially appears to be so;* and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged."

In *Ex parte Watkins* (3 Pet.) Chief Justice Marshall said:

> The cases are numerous which decide that the judgments of a outf record having general jurisdiction of the subject, although erroneous, are binding until reversed. It is universally understood that the judgments of the courts of the United States, although their jurisdiction be not shown in the pleadings, are yet binding on all the world; and that this apparent want of jurisdiction can avail the party only on a writ of error. This acknowledged principle seems to us to settle the question now before the court. The judgment of the circuit court in a criminal case is of itself evidence of its own legality, and requires for its support no inspection of the indictments on which it is founded. The law trusts that court with the whole subject, and has not confided to this court the power of revising its decisions. We cannot usurp that power by the instrumentality of the writ of habeas corpus. The judgment informs us that the commitment is legal, and with that information it is our duty to be satisfied.

This would seem to be decisive of the case at bar.

The jurisdiction of the court over the offense is clear. The petitioner appeared before the court, and no doubt pleaded to the indictment, although that does not appear directly, but is clearly inferrible (see p. 4). Is it not clear, also, that it must be conclusively presumed that the court had jurisdiction over the person of the petitioner? (*Galpin* v. *Page*, 18 Wall., 366.)

The district court is a court of general criminal jurisdiction over that part of the Indian Territory where the offense was committed, and all presumptions are to be indulged for the purpose of supporting its judgments. (*Rhode Island* v. *Massachusetts* (12 Pet., 718, 719.)

The attempt here is to overturn the judgment of a court of general jurisdiction by means of evidence *aliunde* the

record, to show that the petitioner was by law removed from the jurisdiction of the court.

If such evidence is admissible, what is the use of the strict principles with reference to jurisdictional pleas?

Whatever privilege the petitioner had in the premises, he necessarily waived it when he allowed the court to proceed to try him for the offense laid in the indictment, without insisting on his alleged privilege by a plea to the jurisdiction of the court.

THE EVIDENCE SHOWS NO SUCH PRIVILEGE.

The petitioner's claim of a privilege of exemption from the jurisdiction of the court that tried him is founded on article 13 of the treaty of July 19, 1866 (Rev. Treat., p. 85), between the United States and the Cherokee Nation. That article is as follows:

> The Cherokees also agree that a court or courts may be established by the United States in said Territory, with such jurisdiction and organized in such manner as may be prescribed by law: *Provided*, That the judicial tribunals of the nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation, by nativity or adoption, shall be the only parties, or where the cause of action shall *arise* in the *Cherokee Nation*, except as otherwise provided in this treaty.

This is conclusive upon the question of jurisdiction, unless it is "otherwise" provided in the treaty, or unless this treaty has been repealed by some law of Congress or is inconsistent therewith.

But, as is conceded, this article is subject to and controlled by the following language in article 7 of the same treaty, that is to say:

> The United States court to be created in the Indian Territory, and until such court is created therein the United States district court, the

nearest to the Cherokee Nation, shall have exclusive original jurisdiction of all causes, civil and criminal, wherein an inhabitant of the district hereinbefore described shall be a party, and where an inhabitant outside of said district, in the Cherokee Nation, shall be the other party, as plaintiff or defendant, in a civil cause, or shall be defendant or prosecutor in a criminal case. * * *

Now, the claim is that the fact of the establishment by Congress of a court for the Indian Territory had the effect of giving all persons in the Cherokee Nation the right to commit adultery with impunity; for such must be the result of the contention that the district court has no jurisdiction over a member of the Cherokee Nation, inasmuch as adultery is not a crime by the laws of the Cherokee Nation. No construction that produces a failure of government is admissible where the contracting parties were stipulating in the interest of government and law and order.

Nor is it admissible to say that the contracting parties contemplated by the treaty that the establishment of anything less than a court for the Indian Territory having jurisdiction over all crimes and offenses should have the effect of ousting the jurisdiction of the district court that tried the petitioner.

It would indeed be a lamentable state of things if it should be held by this court that there is no law in the Indian Territory to correct the evil of adultery, the widespread practice of which is one of the greatest obstacles to the social elevation of the people of that Territory.

Giving the treaty this reasonable construction, there is nothing in sections 30 and 31 of the act of May 2, 1890, (Pamphlet Laws 1889-1890, pp. 94-96), which would justify the construction contended for by the petitioner. The

language of these provisions should be construed in complete subordination to the treaty, as Congress no doubt intended.

In overruling the petitioner's motion for a new trial the learned judge of the district court delivered the following opinion, which we give for the convenience of the court:

> As the proof of adultery in this case is overwhelming, and as the law defining the crime was correctly given, I will not notice any point in the case but the one going to the jurisdiction of the court. It is as follows: "The defendant being an Indian by blood the court had no jurisdiction to hear and determine the charge set forth in the indictment."
>
> The indictment is found under section 3 of the act of Congress of February 19, 1887, which provides that whoever commits adultery shall be punished in the penitentiary not exceeding 3 years. * * * And it further provides when such act is committed between a married man and a woman who is unmarried, the man shall be deemed guilty of adultery. The facts in this case show that the wife of Mayfield is a white woman by blood, and that the woman with whom Mayfield committed adultery is also a white woman. There can be no question of the jurisdiction of the court over the place of the crime, or over the subject matter of it.
>
> The crime of adultery is one against the public alone—against public morals and against public decency. It is not an offense against the person or property of another, yet as in this case it is a wrong of the gravest character, which indirectly does the greatest possible injury to an innocent, virtuous wife, and innocent children.
>
> The proof shows this defendant to have committed adultery for years with the woman named in the indictment; that he had children by her to the great disgrace, shame, and injury of his honest wife and innocent children by her. It further shows that the defendant made an effort to get Jerome Downing, by offering to pay him $50, to debauch or attempt to debauch his wife, under such circumstances as that he might be caught in the act, that the defendant might use this circumstance as a means of getting a divorce, that he might rid himself of the mother of his children, begotten by him in lawful wedlock, in order that he might enjoy uninterruptedly the adulterous companionship of the woman with whom he was committing the offense of adultery. This is a crime which by its immoral effects works the greatest injury to the public. It is like bribery, perjury, obstructing arrest, bigamy, unlawful assembly, riot, nuisance, treason, or any other offense which is so generally pernicious in its effects as to be regarded by the law as against the whole public, as being a crime directly against public justice, instead of a crime against the person or property of another. Section 2145 of the Revised Statutes of the United States provides that "except as to crimes the punishment for which is expressly provided for in this statute, the general laws of the United States as to the punishments of crimes committed within any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."

This section extends all the general criminal laws of the United States over the Indian country, and it contains no exception of any class of persons as not being subject to these general laws. We must look to section 2146 of the Revised Statutes of the United States for all the exceptions of persons who are not subject to the general criminal laws of the United States. Section 2146 is as follows: "The preceding section shall not be construed to extend to crimes committed by one Indian against the person or property of another Indian, nor to any Indian who has committed any offense in the Indian country, and who has been punished by the local laws of the tribe, or to any case where by treaty stipulation the exclusive jurisdiction over such offenses is or may be secured for the Indian tribes respectively." This not being an offense committed by one Indian against the person or property of another Indian, the first clause of the section is not a prohibition of jurisdiction. If it was an offense against Mrs. Mayfield, she is a white woman by blood, and a jurisdictional citizen of the United States. (*United States* vs. *Rogers*, 4th Howard, 567.)

And for this reason the court would have jurisdiction, unless prohibited by some other clause of the law.

In cases of this kind, out of abundant caution we have confined prosecutions in this court to cases where either the offending party was a jurisdictional citizen, or where the husband or wife of such a party was such a citizen.

The second exception in the above section does not apply in this case, as the defendant has not been punished by the local law of the tribe, for the tribe or nation, I am sorry to say, has no law declaring adultery a crime. Nor does the third exception take this case out of the jurisdiction of this court, as there is no treaty stipulation providing that the exclusive jurisdiction over such offenses shall be secured to the Cherokee Nation.

As none of the exceptions in the section prohibit jurisdiction in this court, and as the offense is one against the public alone, and therefore against the United States, and as the words of section 2145 would give jurisdiction unless prevented from doing so by the exceptions of section 2146, I take it as a reasonable conclusion that the court has jurisdiction, unless there is some other ground upon which to maintain that it has not jurisdiction.

The words of the act creating the crime are "Whoever commits adultery shall be punished," etc. Whoever means any person who, or he, or she, who, or whatever person.

It was held in the *United States* vs. *Crook* (5 Dillon, 45) that an Indian is a person within the meaning of the laws of the United States, and for that reason had a right to sue out a writ of habeas corpus when the law of the United States gave *any person* that right. The same was held to be so in *Ex parte Reynolds* (5 Dillon, 394). If the meaning of the word person includes Indians in the law relating to habeas corpus, why does it not do the same when used in the act making adultery a crime, unless there is some prohibition against its doing so?

A reasonable construction of the sections of the intercourse law above referred to leads to the conclusion there is no prohibition against the word person having an application to, and including, an Indian. But it is claimed this court has no jurisdiction of the offense because the Indian courts have jurisdiction of it, for the reason that there has been a court

of the United States established in the Indian country, and by the thirteenth article of the treaty of 1866 (Revised Indian Treaties, 91) the jurisdiction over offenses committed by an Indian by nativity or adoption has been vested in the courts of the Indian country. The article of the treaty is as follows: "The Cherokees also agree that a court, or courts, may be established by the United States in said Territory, with such jurisdiction, and organized in such manner, as may be prescribed by law; provided that the judicial tribunals of the nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation by nativity or adoption shall be the only parties, or where the cause of action shall arise in the Cherokee Nation, except as otherwise provided in this treaty."

The courts of the Cherokee Nation were to have jurisdiction of a certain kind upon the happening of a certain contingency, which they did not have by the law as declared by the case of *The United States* vs. *Rogers* (*supra*) before that time. The reasonable construction of the thirteenth article of the treaty is that the Cherokee courts were to have jurisdiction over a certain class of persons when a United States court was established in the Indian country with jurisdiction over offenses generally. This has not yet been done. Therefore the thirteenth article of the treaty has not become operative as a means of defining the jurisdiction of the Indian courts. The word "retain," as used in the above-named article of the treaty, has the sense of "keep," when a division of jurisdiction occurs. It does not mean the Indian courts will hold on to the jurisdiction which they had, because by the doctrine of *The United States* vs. *Rogers* they had none to hold on to as affecting adopted citizens. It means in the division of jurisdiction to take place on the happening of a certain event they would keep the jurisdiction enumerated in the thirteenth article of the treaty.

I do not think there is anything in the above article of the treaty against the jurisdiction of this court in a case of this kind. In my judgment if there ever was a case where the court should take jurisdiction if it has it, it is this one. An outrageous offense against the decency and good morals of the public, and the feelings and sensibilities of a wife, has been clearly proven, and the law of the United States is the only law that will reach the offender. If it will not do it, none will, as there is no law in the Cherokee Nation making such conduct a crime.

Motion for a new trial is overruled.

In asking a denial of the writ the undersigned asks leave to say that he regrets his inability, for want of time, to lay before the court a more satisfactory discussion of the questions involved in this case.

WM. A. MAURY,
Assistant Attorney-General.